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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 104

QUENTIN STROUD, ET AL.,
Petitioners,

v.

EZRA T. BENSON, SECRETARY OF AGRICULTURE, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

QUENTIN STROUD, AARON MURPHY, OMLE BLALOCK, FLOYD GRAY, Jr., LEON MURPHY, CARL WHALEY, STEDMAN WILSON, R. J. WILSON, ALDA SHARP, JAMES T. HEATH, ERNEST HEATH, GARDNER HOUSTON, ROLAND CUNNINGHAM, DEWEY JOYNER, JAMES C. WHALEY, TUNK BAKER, JASPER HOUSTON, ERNEST KENNEDY, LLOYD KENNEDY, MARVIN RHODES, E. L. McCOY, EXA HOUSTON, LESTER KENNEDY, JOHN IVY SMITH, WALTER HEATH, OWEN KENNEDY, BRANTLEY KENNEDY, H. C. BAKER, PAUL CARTER, W. A. GUY, ERNEST JONES, W. E. DAVIS, MATTHEW JENKINS, LEE GRIFFIN, NED KENNEDY, MARSHALL KENNEDY, LEONARD KENNEDY, CHESTER J. HOUSTON, S. V. MASSEY, JAMES A. KENNEDY, S. M. JONES, ODELL GRESHAM, VERNELL GRESHAM, G. P. RHODES, CLIFFORD WILLIAMS, NORMAN JONES, LEMON KORNEGAY, LESLIE SERMONS, J. FRED WILLIAMS, S. L. GRADY, G. W. COX, M. K. PORTER, C. P. STOKES, C. T. CARROW, JAMES J. MILLS, BRUCE M. EDWARDS, H. L. FORNES, Jr., L. E. HARDEE, W. L. LITTLE, C. E. GRAY, WESLEY R. ALLEN, FRED MILLS, Jr., GUY L. EVANS, FRED HADDOCK, RAYMOND COX, L. R. HARDEE, J. B. TUCKER, HUGH B. MILLS, H. L. CANNON, MRS. ALMA O. CHERRY, J. LONNIE TUCKER, MRS. ELLA PATE, MRS. FRED EDWARDS, L. B. TUCKER, ANDREW COGHILL, H. D. JOHNSON, ARDEN L. TUCKER and HUBERT C. SUTTON, *Petitioners*,

vs.

EZRA T. BENSON, Secretary of Agriculture of the United States of America, TILLMAN R. WALKER, W. E. MATTHEWS, ZENO RATCLIFF, Jr., and D. S. WEAVER, Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture, H. D. GODFREY, Administrative Officer, Agricultural Stabilization and Conservation Committee, United States Department of Agriculture; FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION OF RALEIGH, NORTH CAROLINA;

[TITLE CONTINUED ON PAGE 2]

[TITLE CONTINUED FROM PAGE 1]

COMMODITY CREDIT CORPORATION; HORACE MEWBORN, Manager, Lenoir County Agricultural Stabilization and Conservation Office; NELSON R. BARKER, Manager, Jones County Agricultural Stabilization and Conservation Office; S. T. BROWN, Manager, Duplin County Agricultural Stabilization and Conservation Office; W. A. HARDY, Manager, Greene County Agricultural Stabilization and Conservation Office; J. C. LANE, Manager, Craven County Agricultural Stabilization and Conservation Office; and JAMES T. MEREDITH, Manager, Pitt County Agricultural Stabilization and Conservation Office,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners above named, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned case on April 1, 1958.

Opinions Below

The opinion of the United States District Court for the Eastern District of North Carolina (R. 22), is reported in 155 F. Supp. 482.

The opinion of the Court of Appeals for the Fourth Circuit (App. p. 24), is unreported, and is appended. (R. Vol. IV, p. 24).

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on April 1, 1958, and copy thereof is appended to this Petition in the appendix, at pages 24-33.

The jurisdiction of this Court is invoked under 28 USCA, paragraph 1254(1).

Jurisdiction of United States District Court

(1) TITLE 7, U S C A, Sec. 1376: "The several district Courts of the United States are vested with jurisdiction specifically to enforce the provisions of this chapter".

(2) TITLE 7, U S C A, 608a(6):

"The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to Sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this Title in any proceeding now pending or hereafter brought in said courts".

(3) TITLE 28 U S C A, Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies".

Questions Presented

1. Does Chapter 21A (Tobacco Inspection Act) TITLE 7, USCA 511 et seq, empower the Secretary of Agriculture of the United States to identify tobacco, as that term is defined in the Act, (a) Upon a variety basis; and (b) by distinguishably different basket tickets upon the auction sale warehouse floor?

2. Does the Secretary of Agriculture of the United States have authority under Chapter 21B (Tobacco Control) TITLE 7, USCA 515 et seq, to adopt and enforce rules and regulations providing for the inspection of tobacco, known as flue-

cured tobacco, upon the farms of the producers and upon a variety basis?

3. Does TITLE 7, USCA 608b, et seq, vest the Secretary of Agriculture of the United States with authority to enforce the rules and regulations for the identification of flue-cured tobacco upon a variety basis, by distinguishably different basket tickets prior to its being offered for sale on the auction market, when said rules and regulations have not been approved by the producers of flue-cured tobacco pursuant to referendum provided for in the said Acts?

4. Is the Secretary of Agriculture of the United States required, under Sub-Chapter 1 (general provisions), TITLE 7, USCA, Sec. 1421, et seq., to support flue-cured tobacco at ninety per cent of parity to plaintiffs as compliance producers (c) Sec. 1421; (b) Sec. 1428; Sub-Chapter 2 (basic agricultural commodities (Sec. 1441(c)), as agreements between the producers and cooperators and the United States?

5. Are the contracts executed between the defendant, auction sale warehousemen and the defendant Stabilization Corporation, requiring the identification of flue-cured tobacco upon a variety basis by the auction sale warehouse operator and the placing of a white basket ticket upon tobacco identified as acceptable varieties, and all other tobacco offered for sale by a distinguishably different (striped) type of basket ticket, valid and enforcible?

6. Is the identification of flue-cured tobacco upon a variety basis upon the auction sale warehouse floor pursuant to the terms and provisions of the rules and regulations in question, including the placing of a striped ticket upon all tobacco offered for sale, except the "acceptable varieties" upon the auction sale warehouse floor prior to its being offered for sale, in violation of the Anti-trust laws of the United States, TITLE 15 USCA, Sections 1, 2, 13 and 14?

7. Are the defendants, Secretary of the United States Department of Agriculture and Commodity Credit Corporation, indispensable parties to the above-entitled action?

8. Are the plaintiffs entitled to the injunctive relief prayed for?

The District Court denied the relief and the Court of Appeals affirmed.

Statutes, Federal Rules and Regulations Involved

The pertinent portion of the statutes involved are as follows:

Chapter 21A—Tobacco Inspection; Sec. 511(f); 511(a), 511(b), 511(d); 511(e), 511(g), 511(i), (c); Chapter 21b, Sec. 515; Sec. 515(a); Chapter 26—Agricultural Adjustment Act; Sec. 602; Sec. 608a, (6); Sec. 608b, c; Sec. 611; Chapter 35, Sec. 1282; Sub-Chapter 2, Chapter 35; Sec. 1301(6)(A) (f) (15); Sec. 1313(b); Sec. 1314(a); Sec. 1340(10); Sec. 1375; Sec. 1376; Chapter 35A, Sub-Chapter 1—General Provisions; Sec. 1421; Sec. 1423; Sec. 1428(b) (c) (i); Sec. 1429; Sec. 1441(c); Sec. 464.901; 22 F. R. 4777; Sec. 464.906(a)-(c); 22 F. R. 4778; Sec. 464.908; 22 F. R. 4778; Sec. 464.910; 22 F. R. 4779.

Tobacco Marketing Quota Regulations of 1957-1958

Sec. 725.830; 22 F. R. 4065; Sec. 725.835(a)-(f), 22 F. R. 4066,67; Sec. 725.838(b),(d); 22 F. R., 4068; Sec. 725.839(b); 22 F. R. 4069; Sec. 725.852(b); 22 F. R. 4071.

COMMODITY CREDIT CORPORATION CHARTER ACT:

TITLE 15 USCA, Sec. 714, et seq.

ANTI-TRUST LAWS INVOLVED

TITLE 15 USCA, Sections 1, 2, 13 and 14.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

Statement

The plaintiffs instituted the above-entitled action in the United States District Court for the Eastern District of North Carolina, seeking to enjoin the placing of striped basket tickets upon their tobacco preliminary to its being offered for sale on the auction sale warehouse floors in the channels of interstate and foreign commerce, alleging that the rules and regulations adopted by the United States Department of Agriculture, through its several agencies, were illegal and void, not having been approved by the producers of tobacco in the manner prescribed by TITLE 7, USCA, Chapter 21A, Tobacco Inspection; 21B, Tobacco Control, and Chapter 608c, or by the Administrative Procedure Act, TITLE 5 USCA, Section 1001, et seq. (R. Vol. I, 1-17).

The plaintiffs allege that the rules and regulations under which their tobaccos were being identified upon a variety basis were adopted after the 1957 tobacco crop in the flue-cured bright leaf belt had matured, or practically matured, and amounted to the taking of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (R. Vol. I, 11-12). They further allege that they are each within-quota producers of tobacco and are entitled to have their tobacco supported at ninety per cent of parity, and that the defendants were supporting their tobacco on the auction sale market at fifty percent of

parity, (R. Vol. I, 9-10). They further allege that the enforcement of the rules and regulations through which their tobacco was identified upon the auction sale floor through the use of striped basket tickets, removed the tobacco from auction sale, and was in violation of the Antitrust laws of the United States; TITLE 15 USCA, Sections 1, 2, 13 and 14. (R. Vol. I, 19-20).

They further allege that they were each suffering irreparable injury and damage to the extent of more than two-thirds of their respective 1957 crop of tobacco (R. Vol. I, 10-11); further alleging that the placing of striped basket tickets upon their tobacco preliminary to its being offered for sale on the auction sale warehouse floor removed the tobacco from auction sale and deprived them of a market for their tobacco. They further alleged that the damages sustained by them exceeded $500,000.00 (R. Vol. I, 18).

The plaintiffs offered evidence in support of their allegations. (R. Vol. I, 49-103).

At the beginning of the hearing before the United States District Court the defendants moved to dismiss for that:

(1) The Court lacked jurisdiction over the subject matter;

(2) The Court lacked jurisdiction over the person of Ezra T. Benson, Secretary of Agriculture;

(3) The venue as to the Secretary of Agriculture is improper;

(4) The Secretary of Agriculture is an indispensible party;

(5) The Complaint fails to state a claim on which relief can be granted.

The District Court overruled the motion and proceeded to consider the case on its merits. (R. Vol. I, 23).

The Court entered an order, "MEMORANDUM, FINDINGS OF FACT AND ORDER" (R. Vol. I, 22-45). Excerpts from the

rules and regulations of the United States Department of Agriculture were quoted. (R. Vol. I, 26-45), and in which it found as a fact "with regard to the identification order, no notice, hearing, or referendum was had which would comply either with the provisions of the Agricultural Marketing Agreement Act of 1937 (TITLE 7, USCA Sec. 601 et seq), or with the provisions of the Administrative Procedure Act, TITLE 7, USCA, Sec. 1001, et seq, if such provisions are applicable, as a matter of law, to the regulation in issue". (R. Vol. I, 30-31).

The Court further found as a fact that it was the duty of the Secretary of Agriculture to support tobacco at ninety per cent of parity. (R. Vol. I, 31). The Court further found as a fact that a substantial number of plaintiffs unknowingly planted flue-cured tobacco during the 1957 crop year "which has been determined to possess growth characteristics or seed strains of the 'discount' varietres". (R. Vol. I, 31).

The Court further found as a fact that the "tobacco buyers so far have not and are not placing any bids for tobacco offered for sale on any warehouse floor upon which a striped basket ticket appears". (R. Vol. I, 33); and further: "A substantial quantity of tobacco grown by plaintiffs during the present season would bring higher prices pound for pound if offered without the identification as 'discount' tobacco, for the reason that it is difficult to identify in some instances in the rush of the auction sales."

The Court held that the rules and regulations were valid under the Agricultural Act of 1949, TITLE 7 USCA, Sec. 1421 et seq.

The evidence offered by the defendants did not challenge the evidence of plaintiffs in support of their allegations concerning the irreparable damage they were suffering through the enforcement of the rules and regulations of the United States Department of Agriculture, through which

their tobacco was being identified upon a variety basis, by striped basket tickets on the auction sale market and at fifty per cent of parity.

On appeal, the Court of Appeals affirmed.

The Court of Appeals considered primarily the question of the duty of the Secretary of Agriculture to support plaintiffs' flue-cured tobacco at ninety per cent of parity, (R. pp. 25, 26). It gave a resume of the defendants' contentions relating to the full-bodied, full-flavored and aromatic characteristics of tobacco desired by the foreign trade, referring to the 1955-1956 market years during which the three varieties, Coker 139 and 140, and Dixie Bright 244, were grown, and that the 1956 crop consisted of fifty to sixty per cent of these varieties; and that 22.49 per cent was taken into the stabilization pool during 1956, and that the future of the industry was alarming. It also outlined the procedure through which the tobacco was identified upon a variety basis, and that through the enforcement of the regulations the 1957 season witnessed a dramatic restoration of confidence. It then gave consideration only to the question of jurisdiction of the Secretary of Agriculture, setting forth the principle—

> "If, broadly considered, the suit is in essence one against persons threatening the invasion of a private right, they may be enjoined. If they claim to be acting under an authority which the law does not recognize, the absence from the proceedings of the official whose unlawful orders they rely upon does not bar the action against them". (R. pp. 30-31)

The Court concluded that the Secretary and Commodity Credit Corporation were indispensable parties without deciding, except by inference, the question of the validity of the regulations which were the subject of attack in the case at bar. Its opinion appears to have been based in part at

least upon the premise that the suit would expend itself on the public treasury or domain, or interfere with public administration, (R. p. 32), concluding that "the Government's liability cannot be tried behind its back", and that the case should have been dismissed for jurisdictional grounds for want of a necessary party, holding "the order appealed from will accordingly be vacated, without any intimation, however, that the merits were not correctly decided by the District Judge, and that the case will be remanded with direction that it be dismissed for lack of jurisdiction.

Reason for Granting the Writ

The decision below should be reviewed because it erroneously failed to apply the facts to the law relating to the enforcement of rules and regulations affecting the production of flue-cured tobacco by within-quota producers under the terms and provisions of the Agricultural Tobacco Marketing Agreement Act of 1937,—TITLE 7, USCA, Sec. 601, et seq, as amended, including the amendment referred to as the Agricultural Act of 1949, TITLE 7, USCA, 1421 et seq. Section 608b of Chapter 26, TITLE 7, USCA, specifically provides:

> "The Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the Anti-trust laws of the United States, and any such agreement shall be deemed to be lawful:"

The decision of the Court of Appeals is in conflict with the decision in the case of *U. S.* v. *Rock Royal Co-op*, 307 U. S. 533, in which the Court held that "Section 8B authorizes the Secretary of Agriculture to enter into marketing agreements with producers and others engaged in the handling of agricultural commodities or in affecting interstate commerce"; and further, "they are to be entered only when the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity or product thereof, and after notice and an opportunity for hearing. It is necessary also for the Secretary of Agriculture to set forth in such order a finding upon the evidence introduced at the hearing, that the issuance of the order and of the terms and conditions thereof, will tend to effectuate the declared policy * * * *." Orders may only be issued after hearing upon a marketing agreement which regulates the handling of the commodity in the same manner as the order.

The Court, further considering the failure of handlers under the Act to sign a marketing agreement, and the authority of the Secretary of Agriculture to act, states:

> "In such a case (failure of handlers to sign) the order must be approved or favored by two-thirds of the producers in number or volume who have been engaged, during a representative period, in the production for market of the commodity * * *".

The same principle is upheld in the case of *Parker* v. *Brown*, 317 U. S., 341.

The record shows that 416 farmers were affected adversely by the enforcement of the rules and regulations of the Department of Agriculture, which are obviously void as being contrary to the Agricultural Adjustment Act, and the decisions of the United States Supreme Court, interpreting same, and also an invasion of the constitutional

rights of the plaintiffs in respect to the production of flue-cured tobacco and the marketing of same in the stream of interstate and foreign commerce.

The questions presented in this case are of great and recurring significance in the administration of the Crop Control Program by the United States Department of Agriculture.

It is stated in the brief of the defendant, Stabilization Corporation, that it is the purpose of the defendants to enforce similar regulations during the 1958-59 tobacco year, which are likely to be fraught with similar problems of enforcement and comparable irreparable loss to the producers.

The plaintiffs are entitled to the relief prayed for without the presence in the suit of either the Secretary of Agriculture or Commodity Credit Corporation. The agencies through which the void rules and regulations have been and are being enforced are before the Court. The serious questions involved and the effect of the decision below, if unreversed, will materially affect the agricultural program to the detriment of the public interest, and the Court should at least exercise its discretionary jurisdiction and grant this Petition.

Conclusion

For the reasons set forth, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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